STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2006
v	No. 258145 Ingham Circuit Court
SHARON ANN CROWELL, Defendant-Appellant.	LC No. 02-000401-FH

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Following a jury trial, defendant was convicted of embezzlement of $20,000.00 or more, MCL 750.174(5)(a). Defendant was sentenced to 60 months' probation with nine months in jail and to pay $120,897.61 to L&L Food Center ("L&L"), the victim, and $1,347.81 to Ingham County for extradition expenses. We affirm.

Defendant argues on appeal that she was denied effective assistance of counsel because trial counsel allegedly failed to: investigate, hire an expert witness, present a defense, move for dismissal, and object to the amount of restitution. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. . . . [A] trial court's findings of fact are reviewed for clear error. Questions of constitutional law are reviewed . . . de novo." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002).

Effective assistance of counsel is presumed, and any defendant seeking to prove otherwise bears a heavy burden. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See also *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994) (adopting the *Strickland* test). In order to prove deficient assistance of counsel, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra*, at 687.

First, defendant contends her trial counsel was ineffective because he failed to investigate. Specifically, defendant argues that counsel failed to investigate the names and addresses of other employees who had access to the safe. Defense counsel has a constitutionally

imposed duty to investigate the case. *People v Dixon*, 263 Mich App 393, 397; 688 NW2d 308 (2004).

In this case, counsel made several attempts to ascertain the names of people who had access to the cash room by writing letters to the prosecutor and bringing the issue to the attention of the court. L&L's human resource director gave counsel a list of all the employees who had access to the cash room and the safe as defendant requested. Apparently, the only time L&L was unable to provide defendant with a name and address was when defendant sent a vague request that only included the physical description of the employee. By the time trial came, defendant had a complete list of the employees who worked in the cash office and counsel felt he had sufficient information to proceed to trial.

Defendant repeatedly stated that her purpose for finding the names was to find out who had access to the cash office and safe. Therefore, regardless of whether defendant had a list of every employee who worked for the company during the time periods in question, defendant was able to elicit from the prosecutor's witnesses that numerous people were in and out of the cash office and had access to the safe. Any additional witnesses would have simply given cumulative testimony. Therefore, defendant failed to show that counsel's performance was deficient for failing to conduct a proper investigation.

Next, defendant argues she was denied effective assistance of counsel because counsel failed to hire an accounting expert. The decision whether to call a witness is presumed to be a matter of trial strategy for which this Court will not substitute its judgment. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

In this case, defense counsel's primary defense theory was that defendant did not commit the crime with which she was charged. Pursuant to counsel's trial strategy, hiring an expert witness was not necessary because defendant was able to elicit from the prosecutor's witnesses that (1) there were numerous people who had access to the cash office, (2) there were other people who also prepared reports relating to the missing monies, and (3) there was money missing on days defendant did not work. Further, the prosecutor continually stated that one of the circumstantial pieces of evidence that pointed to defendant's guilt was the fact that the documents necessary to trace the cash flow were missing, and therefore it is questionable whether there would have been sufficient documents for a hired expert accountant to review.

Defense counsel also consulted with other professionals who opined that hiring an expert accountant would not add anything to the defense theory. Hence, defense counsel considered the possible need for an accounting expert and made a strategic decision that hiring an expert witness would not bolster the defense theory. Additionally, defendant has not stated how an accounting expert could have added to defendant's trial strategy or even that an expert would have testified favorably on her behalf. See *Ackerman, supra* at 455 (noting that defendant must offer proof that the expert would have testified favorably). Accordingly, defendant has failed to rebut the presumption that her trial counsel's decision not to hire an expert witness was anything other than sound trial strategy.

Next, defendant contends she was denied effective assistance of counsel because counsel failed to present a defense. "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). As already noted, defendant's counsel presented a defense based on the theory that defendant was not responsible for the lost money. To this end, defendant's trial counsel elicited testimony that numerous persons had access to the cash office, that some of the reports and documents on which the prosecutor relied were prepared by persons other than defendant, and that monies went missing on days when defendant did not work. Further, on appeal, defendant does not contend that defense counsel failed to present the stated defense or that there was another plausible defense counsel should have raised. Consequently, defendant failed to meet her burden to establish that, as a result of her trial counsel's actions, she was deprived of a substantial defense.

Next, defendant contends she was denied effective assistance of counsel because counsel failed to move for dismissal. However, defendant brought a motion to dismiss, and brief in support thereof, on which the court held a hearing. Accordingly, defendant was not denied effective assistance of counsel in this regard.

Finally, defendant argues she is entitled to resentencing because counsel was ineffective for failing to object to the restitution amount being based on facts not proven to a jury beyond a reasonable doubt.[1] But this argument is premised on the novel contention that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), limit a trial court's ability to award restitution. Trial counsel cannot be deemed ineffective for failing to make a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Further, defendant was sentenced before *Blakely* was decided, and trial counsel cannot be considered ineffective for failing to anticipate *Blakely*.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell

[1] Although defendant argued that she was deprived of the effective assistance of counsel based on her trial counsel's failure to object, other than the identified objection, defendant has failed to support her claim by citation to the record or relevant authority. Therefore, to the extent that defendant claims her counsel should have made further objections, those claims were abandoned on appeal. *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002). Likewise, because defendant presented this question as one of ineffective assistance of counsel, we shall limit our analysis accordingly. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).